State of New Jersey

Department of Environmental Protection

The Guide to Tidelands

A compilation of information on State owned and claimed tidelands within the State of New Jersey.

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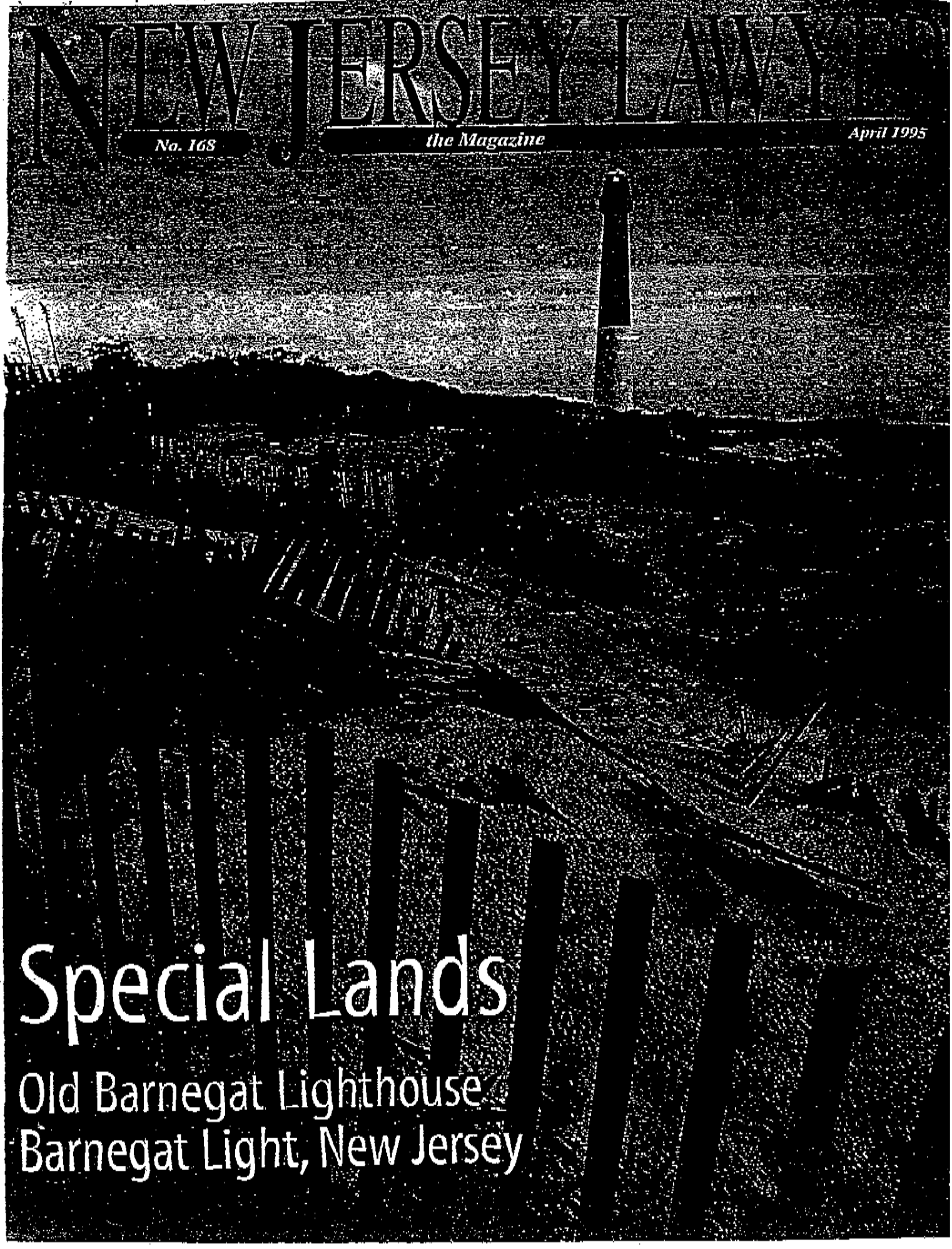

Special Lands

Old Barnegat Lighthouse
Barnegat Light, New Jersey

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Resolving State Title Claims to Tidelands: Practice and Procedure

By William E. Andersen

Counsel representing principals, lenders or insurers concerning New Jersey real estate should include state claims to tidal lands in their checklist of items to review in every matter. Such claims can exist on property that appears to have no relation to tidal waters because, until relatively recently, it was common for New Jersey landowners to fill tidal lands adjacent to their properties. Today, such lands look no different than property that has never been flowed by the tides. This article will discuss what tidal claims are, set forth in detail how to determine whether they affect a property and identify the step-by-step procedures that should be followed to remove the state's claim on title.

State Ownership of Tidal Lands

Ownership of tidal lands was vested in the states upon their entry into the Union. The state owns, as a proprietor, all tidelands within its boundaries, *i.e.*, New Jersey lands now or formerly naturally flowed by the mean high tide.[1] The tidal lands are held in a public trust for the benefit of all the people of the state.[2] The Tidelands Resource Council is the public body charged with initially reviewing and then recommending the state's conveyances of tidelands. The proceeds of sales and leases of these lands are dedicated to a state education fund.[3] Notably, however, the state makes no claim to own the beds of watercourses that are not tidal, regardless of whether they are navigable.[4]

The boundary between state-owned tidal lands and the adjacent privately-owned upland is the mean high water line. New Jersey follows the majority rule among the states in this regard. If the shoreline is natural, *i.e.*, unbulkheaded, it may erode over time, so that there is less dry land, or, it may accrete, so that the upland grows larger over time. When true, natural erosion occurs, *i.e.*, when the natural carrying away of imperceptible bits of upland occurs over time, the upland owner's title to the land ebbs as well. When natural accretion occurs, *i.e.*, when the imperceptible deposit of material by the tides adds to the upland, the upland owner's estate grows. This principle is known as the Doctrine of Equal Compensation.[5]

The processes of erosion and accretion occur slowly over time. If the loss or gain is sudden so that it is perceptible, the boundary line is unaffected.[6] Storm damage is a common example of this phenomenon. If a storm removes a beach, the upland property owner still has private title extending to the location of the natural mean high water line before the storm. Similarly, there is no change in boundary if the storm deposits soil on the upland. The new upland property is state-owned, and the original upland may no longer be waterfront property.[7] If the private owner loses upland to a storm and does not reclaim it within a reasonable time, title will then return to the state.[8] Reclamation may be precluded, however, because of specific state and federal waterfront development regulations. Eventual state ownership in such circumstances may be inevitable.

Artificial Changes

The boundaries of state tidelands are not affected by artificial changes. The state does not own artificial tidal areas, such as lagoons, constructed basins or relocated streambeds.[9] But it does claim title to those portions of basins and lagoons that once were natural tidal areas, such as the beds of tidal streams that once existed.

The state also claims fee simple title to those portions of natural bay or ocean bottom, riverbeds and streambeds that were once flowed by the tide but are now artificially filled.[10] These lands are now high and dry and are usually indistinguishable from the surrounding natural upland. Generally, counsel will be called upon to resolve this sort of claim in conjunction with a closing or a refinancing.

Does the State Have a Tidelands Title Claim?

The process to determine whether the state has a tidelands title claim to a specific property is, for the most part, straightforward. There are no such claims in Morris, Sussex, Warren or Hunterdon counties. There are some tidal claims in Somerset County, but only in extreme northeast Franklin Township. Most of the dry land areas in the remaining counties have no claims, but the state does claim title to all unconveyed natural tidal areas in the remaining counties. In addition, some of the dry land areas in these counties contain state claims as former natural tidal areas.

To determine whether there is a claim to a property in these 16 counties, counsel should first consult a Department of Environmental Protection (DEP) paperback handbook titled *Lands Subject to Investigation*.[11] If the subject property is not within an area that has been investigated for claims, there is no state tidelands claim. If the vicinity of the subject property has been investigated for claims, the results of those investigations are shown on one or more of 1,628 filed state tidelands claims maps.

Each state tidelands claims map depicts an area 964.2 acres or 1.5 square miles in size and bears both a descriptive name and a number, *e.g.*, "Bay Head Harbor," No. 448-2172. A claims map consists of two sheets that must be used together: a rectified aerial photograph, known as a photo base map, and a clear plastic claims overlay.

Paper copies of these maps are available in the relevant municipal clerk's office. Also, a complete set of paper prints for the entire state is available at the office of the Secretary of State.

Original plastic sets — which are much more exact due to the stable, durable nature of plastic — are available at the office of the county clerk or registrar. Also, the DEP has plastic sets available for examination at the Bureau of Tidelands Management (Bureau) in Trenton and at DEP field offices in Toms River, Ocean County and in Pomona, Atlantic County. Many engineers, surveyors and title company offices have plastic sets of those areas they frequently review.

To delineate a claim area, counsel should be sure that the experts involved use plastic sets, not paper copies, especially in close cases. If a commercial search firm determines for counsel whether there is a claim, or whether the question is "too close to call," one caution is in order. Deed descriptions, filed maps, valid or void grants, nearby grants and licenses approved under the Wharf Act of 1851 are beyond the scope of such a review, but can nevertheless affect whether there actually is a claim.

Looking Beyond State Tidelands Claims Maps

Counsel's initial review of the state's maps may determine that there is, or is not, a claim. In either case, the result requires further examination. The state's tidelands claims maps in and of themselves do not tell the whole story.

Suppose no claim is evident on the property in question according to the tidelands claims map. If the property is well inland from any present tidal waterway, counsel can probably rest assured that there is no claim. The state is barred from making new claims not shown on the maps unless it can show that the property has been tidal, even artificially, in the last 40 years.[12] Such a showing is very unlikely because the state has examined photographs available since 1932 to make the claims it has shown on the filed maps.

If the property is adjacent to a natural tidal waterway, and the map indicates a claims line that appears to be offshore of the upland boundary, the state's position will probably be that the boundary between the state and private ownership is the present mean high water line, regardless of the position of the line "in the water." All presently flowed tidal lands are presumptively state-owned.[13] The only exception to this position may be if the waterway has been artificially widened. Also, even if the tidelands claims maps suggest that there is no claim on the property, the state reserves the right to assert a claim to lands formerly tideflowed based upon deed descriptions in recorded titles and/or filed maps.[14] If the bearing and distance to the property boundary in a deed in the chain of title or the filed map shoreline falls short of the bulkhead or the high water line, the state may claim that the additional land was once tidal and was artificially filled. If true, this fact would make the land state-owned.

On the other hand, the state's filed claim to formerly tideflowed or even presently tideflowed land is not necessarily current either. There could have been natural accretion. The maps show claims to natural tidelands as of the early 1970s in the Hackensack Meadowlands and as of 1977 or so elsewhere. Counsel may be able to demonstrate that the property is all private upland by virtue of natural accretion since the date of the mapping.

Also, the claims maps do not show the state's conveyancing and leasing activities since 1804. The property may be the subject of a state legislative grant enacted between 1804 and 1869,[15] or a private owner's predecessor in title could have purchased the state's ownership interest at some time after 1869. A proper title search will show such riparian grants, but it often will require more than the common 60-year search to do so.

State Tidelands Grants

State tidelands grants are obviously significant to a property's title. If the grant is without restriction, it supersedes the state tidelands claims line. Nearly all such grants have some restrictions, however, and the current title holder takes title subject to them. If the property has been filled beyond the bulkhead line in the grant, for example, a state claim remains to the unauthorized filled area even if the filed claims line is waterward of the bulkhead. The grant condition controls. Grant conditions are read in favor of the state, even if the state wrote the grant.[16] So, for example, a deed provision allowing the property to be used only for park purposes is a permanent restriction, even if the parties apparently forget over time that it is there.[17]

Another problem involving grants that occurs surprisingly often concerns the upland owner clause. Because the state may deed tidelands only to the upland owner[18] and because the state may not adjudicate

a disputed title to determine who actually is the upland owner,[19] the state historically has inserted in every tidelands grant a clause voiding the grant if the actual grantee is not the true upland owner. Where the grantee is not the upland owner, title thereupon automatically reverts to the state. The state currently requires confirmation that the proposed grantee is the true upland owner three times during the grant application process. Still, the wrong person or entity often accepts delivery and pays the grant price.

Recently, the state has applied N.J.S.A. 12:3-45 *et seq.* to such situations when they are discovered and has assessed an additional consideration of $1,000 or more for a subsequent corrective deed. But the penalty could be far worse for the person seeking the grant. The claimed area could revert to the state, and the consideration already paid could be forfeited.

Counsel should also be aware of another not so obvious use of previously delivered tidelands grants. At times, the state's tidelands claims map has delineated a former tidal watercourse at one location, while an earlier grant map depicts a similarly configured watercourse a short distance away. If counsel can show that only one watercourse actually existed, then the state may have conveyed that watercourse in the earlier grant. Thus, the subject property, on which the state now makes a claim, may be entitled to a Statement of No Interest.[20] This document is a recordable instrument with the strength of a grant, which permanently waives any state tidelands claim on the subject property. No consideration is charged for such instruments, only a processing fee, and the turnaround time is usually far less than for a grant or a long-term lease.

It is, therefore, important to check any grants on adjacent properties for comparison to the claims map. The most convenient way to check for adjacent grants is to request a paper copy of the Conveyance Overlay covering the subject property, if it is available, from the Bureau. Counsel must also be sure to consult the grants themselves. Generally, such nearby grants do not show up in a title search or in a routine engineering or surveying check. Once again, counsel's expertise is required.

Counsel may also uncover tidelands conveyances in the form of freeholder's licenses approved for the Hudson River, the Kill von Kull, and New York Bay between 1851 and 1869, and elsewhere in the state from 1851 to 1892.[21] These licenses allowed upland owners to fill waterward of the low water mark as long as navigation was unimpaired. Once the filling took place, the new upland became privately owned. The state has approved Statements of No Interest to claimed areas under such circumstances, but it is counsel's burden to show that the recorded license applies to the subject property and that the filling took place before 1892.[22]

THE GRANT PURCHASING PROCEDURE

The next point in the process begins when counsel has determined that the subject property is in an area subject to investigation, has found that the property has a state tidelands claim and has searched the title and reviewed nearby grants to determine that there has been no prior conveyance of the state's tidelands. If the claim area is natural tidelands, counsel should pursue the matter with the state just as any property owner or potential purchaser would do with any other land owner. The state will be responsive, with one major exception. Because of the state's fiduciary responsibility over these public trust assets, it rarely consents to the outright sale of naturally flowed tidal lands. Instead, private or commercial interests, such as marina operators, can expect to be offered the opportunity to apply for 3-year licenses, or occasionally 20-year leases. The state must secure fair market value in these and all other tidelands transactions, and applicants should be prepared to commence negotiations by first presenting their own professional appraisal. "Low balling" slows down or kills the process. Successful negotiators are realistic and present very near their best offer first. The state does not make "hold up" demands. Moreover, applications for licenses for individual docks adjacent to single-family homes need not be accompanied by appraisals. Tax assessment data or a recent sale is generally enough.

Commercial, industrial and multi-family residential property owners can also expect to be required to provide and maintain appropriate public access to the waterfront on their sites as a condition of the receipt of a lease or license. Grants to formerly flowed waterfront areas made to commercial, industrial or multi-family residential applicants also often require public access. This requirement fulfills the state's public trust interest in these lands. Some recent inverse condemnation determinations could be construed to limit government's exaction of public access areas in exchange for a permit,[23] but such arguments do not apply in tidelands matters. The state is allowed to set conditions for its tidelands instruments,[24] and, in many cases, public access as a part of a grant, lease or license is a "take it or leave it" situation. "Leave it" means that the applicant may not occupy the natural tidelands with any structures at all. The Executive Branch is serious about public access,[25] as are the Legislature[26] and the courts.[27]

If the subject property is now entirely "high and dry" but there nevertheless is a claim, counsel has many responsibilities. First, it is important to have the claim depicted accurately on a current survey of the property and to have its area measured. Be sure that the survey uses a plastic claims map set, and not paper prints. Second, counsel must determine the current fair market value of the claim area. This process is done by determining the fair market value of the entire property, land only, per square foot. Then counsel should multiply the claim area by the per square foot value. The result may be the record title owner's maximum exposure.

At this point in the sale of a developed parcel, the interests of the buyer, seller, title insurer, lender and broker tend to diverge widely. The buyer usually seeks to have the seller pay to clear the title, although the well-informed buyer often wants to control the process. The seller can sometimes turn the matter over to a

title insurance company. Less frequently, the seller can reach back through warranty deeds to a predecessor's title company. Sellers generally want an upset cost for the grant and its processing, and interest on the escrow. Lenders and their title companies often attempt to escrow multiples of the maximum grant price, and brokers want the deal to close without any reduction in the sales price. There are many variations on these scenarios.

Counsel for all sides can do much to enhance the ultimate result. The first step is to file an application with the Bureau. Ask the Bureau to determine "the source of the claim," *i.e.*, the date of the map or the photographs that show the watercourse as existing on the property. A critical document in this phase of the process is *Attorney General Formal Opinion No. 3-1983*.[28] It authorizes the state to reduce the constitutionally mandated value of its claim based on a perceived litigation risk. This litigation risk discount can be applied in settlement discussions without the necessity of any litigation being filed. The discount amount fluctuates.

The Formal Opinion also allows the state to negotiate below fair market value when the record owner: (a) did not do the filling; (b) does not have title insurance to cover the cost of the claim; and (c) did not have notice of the claim, *i.e.*, by deed description or filed map, or by purchasing after the state's claims map was filed. This "good faith discount" fluctuates as well and varies inversely with the unit value of the property. It reflects the cost of reclamation. Counsel in a closing can protect the seller's claim to a good faith discount by establishing a realistic escrow. Closing with only a reduced sales price will forfeit the discount.

If proposed construction on the state's claim area must be done before obtaining a tidelands deed, counsel can secure an interim license from the state to allow construction to go forward on the state-claimed area. Such permission is prudent to avoid increased charges that could be assessed for unauthorized improvements.[29]

The applicant must furnish an appraisal in nearly all grant applications. The state then prepares a professional appraisal review. The state also analyzes the property's history *vis-a-vis* the claimed area. When was the claimed tidal land filled? Why? Who owned it then? Is the present owner entitled to a good faith discount or a litigation risk discount? Counsel should be alert to present the best case during the staff review, before the Bureau's position has been formalized.

Title Insurance Considerations

The interaction between title insurance and state tidelands claims can be crucial. The state looks to the exceptions listed in Schedule B of the title policy to determine whether title insurance covers the claim. If there is title insurance, a good faith discount applies to the extent of the policy coverage. If the exception in Schedule B excludes "lands now or formerly flowed by the mean high tide," the state generally will recognize the exception and consider a good faith discount. Any other language usually requires more study.

For example, excluding the state's claims to "the bed of Sunfish Lagoon" does not exclude the claims to formerly tide-flowed streambeds not in the lagoon. Therefore, coverage could be considered to apply to filled claim areas. Exclusions are read in favor of the insured, and in favor of coverage.[30]

Also, the state will not recognize exclusions to "filled-in lands" that sometimes are found only in the Conditions and Stipulations section of a policy. Burying exclusions in this section does not provide the insured with the agreed upon coverage.[31] If the policy limit does not cover the claim's value, a good faith discount should be explored for the overage. While title insurance companies have objected to the denial of good faith discounts when they are paying on a claim, such claims were within their ability to discover, and they were paid a premium to cover them.[32]

The Role of the Tidelands Resource Council

At this point, the matter is ready to present to the Tidelands Resource Council. Counsel will be informed of the date, time and place, and can usually review the agenda, including the staff recommendation, ahead of time. The Council is a 12-member volunteer board that meets twice monthly. The members are gubernatorial appointees and serve four-year terms or until successors are appointed.[33]

Statements are not sworn, and there is no formal examination or cross-examination. There is, however, considerable discussion among the staff, the Council and the public, if interested parties are present. Such discussion usually occurs when there are substantial or controversial matters.

The Council's decision is by motion of an absolute majority of all of the members.[34] If there are 12 appointed members, seven must vote in favor of an action. If only seven are present, any dissent or abstention amounts to a veto. In close matters, the presence of counsel and the applicants or opponents themselves can be decisive.

If an application is not approved or if the set conditions are unacceptable to the applicant, counsel may request reconsideration. Such requests are routinely allowed and are *de novo*. Counsel should prepare a position paper and, if appropriate, secure current appraisal information or other documentation for the Council's further review.

Once the grant or lease is approved by the Council, a statutory review process begins.[35] The Commissioner of the DEP considers each action by reviewing the Council's minutes. Once the Commissioner approves a Council's action by approving the minutes of the meeting at which the action occurred, the Bureau asks the applicants whether they will accept the Council's offer and set conditions. If the applicants accept, they pay an application processing fee,[36] and the Bureau prepares a draft deed. Counsel then must review this document. The text of most of the conditions, except the upland owner clause, can be discussed with the Bureau and with the Attorney General's office and may be subject to some negotiation of terms.

When both sides are satisfied

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with the text, it is presented to the Commissioner of DEP, the Attorney General and the Governor for their approval. If, as is most often the case, the documents are approved, they are signed and sealed by the Secretary of State and recorded by the Bureau. The applicants then submit payment, and the grant or lease is delivered. Counsel should record the document in the county where the property is located and report the recording information to the Bureau. The state then closes its file.

Expediting the Process

The entire process, starting with a completed application and concluding with a delivery, takes six months to one year for a routine application. There is no limit to how long a complex matter can take, but most of the time is spent preparing the application for presentation to the Council. Counsel can speed the process by responding to requests for information in a timely fashion and by keeping in touch with the Bureau's staff at regular intervals. The grant or lease application process is a demanding one.

Counsel must be vigilant and responsive because the Bureau has a heavy caseload to manage. It is particularly important to respond to all requests for additional information made by the Bureau. When asking for a status report after many months of apparent inaction, counsel often have been embarrassed to find that the state has asked counsel for information that was never provided. As a result, the processing of the proposed grant has stopped, and counsel, not the state, is to blame.

Another option that is always available to counsel is to file suit in Superior Court to quiet title.[37] There are a few reasons why, in the past decade or so, fewer than a dozen such suits have been filed. The first is the availability of good faith discounts and realistic litigation risk discounts in the application process. Second, the cost of litigating the technical claim is substantial. Also, if the state prevails, the likelihood of a good faith discount is minimal, and no litigation risk discount will be offered. The plaintiff will be required to pay 100 percent of the original fair market value, if the state is even willing to sell at all. The state has no obligation to sell its interest.[38] Third, there are few opportunities for procedural challenges to the state's claim or to the grant application process. The state's mapping program has been judicially approved,[39] as well as its power to assert certain claims not made on the claims maps.[40]

The Council's actions need not follow the Administrative Procedure Act and may include setting such proprietary policies as imposing charges for "use and occupancy" or back rent.[41] There is no entitlement to a hearing by the Office of Administrative Law on Council actions. There are no rules in the Administrative Code restricting the state's decisions on tidelands matters. The statutes provide sufficient standards.[42] Indeed, any state official in the statutory approval process may refuse or retract approval of a grant or a lease before delivery.[43]

The state's approval or disapproval is not subject to the usual rules restricting governmental action because the state acts as a proprietor.[44] The conditions in the grant are not subject to attack as uncompensated takings. The amount of consideration set by the Council and the state is reviewable by the courts only if it is so low that it impairs the value of the land as a dedicated asset of the education fund — not because the proposed grantee thinks it is too high.[45]

Essentially, counsel's primary choices are to deal within the existing administrative framework or to mount a frontal attack on the claim itself. Most attorneys in recent years have found that presenting their most favorable case to the Tidelands Resource Council is in their client's best interest, no matter what interest their client has in the state's tidelands.[46] ■

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Endnotes

1. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *O'Neill v. State Highway Dep't.*, 50 N.J. 307 (1967); *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821).
2. *Phillips*, 484 U.S. 469; *Matthews v. Bay Head Improvement Assoc.*, 95 N.J. 306, *cert. den.*, 469 U.S. 821 (1984).
3. *N.J. Const.* (1947), Art. VIII, §4, ¶2; N.J.S.A. 18A: 56-5 and -6.
4. *Cobb v. Davenport*, 32 N.J.L. 369 (Sup. Ct. 1867).
5. *Ocean City Assoc. v. Shriver*, 64 N.J.L. 550 (E. & A. 1900).
6. *O'Neill*, 50 N.J. 307.
7. *Housing Authority of the City of Atlantic City v. State*, 193 N.J. Super. 176 (App. Div. 1984).
8. *Ward Sand & Materials Co. v. Palmer*, 51 N.J. 51 (1968); *Leonard v. State Highway Dep't*, 29 N.J. Super. 188 (App. Div. 1954).
9. *Velsicol Chemical Corp. v. State*, 182 N.J. Super. 575 (App. Div. 1982).
10. *O'Neill*, 50 N.J. 307.
11. Available from the Bureau, CN 401, Trenton, N.J. 08625. The cost currently is $20, including tax, postage and handling.
12. *N.J. Const.* (1947), Art. VIII, §5, ¶1, the 1981 Riparian Constitutional Amendment.
13. *O'Neill*, 50 N.J. 307.
14. *City of Jersey City v. Tidelands Resource Council*, 95 N.J. 100 (1983).
15. L. 1869, c. 383, p. 1017. That law, an amendment to the General Riparian Act, established the Board of Riparian Commissioners and the administrative procedures still being followed in general today.
16. *City of Passaic v. State*, 33 N.J. Super. 37 (App. Div. 1954).
17. *United States v. City of Hoboken*, 29 F.2d 932, 948-949 (D.N.J. 1928).
18. N.J.S.A. 12:3-7 and -10.
19. *Brown v. Morris Canal & Banking Co.*, 27 N.J.L. 648 (E.& A. 1858); *Bailey v. Driscoll*, 34 N.J. Super. 228, 245 (App. Div.), *aff'd in part, rev'd in part*, 19 N.J. 363 (1955).
20. N.J.S.A. 13:1B-13.5 (a).
21. L. 1851 p. 335, the Wharf Act, was repealed in two stages. N.J.S.A. 12:3-4.
22. *Ward Sand & Materials Co.*, 51 N.J. 51 (1968).
23. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).
24. N.J.S.A. 12:3-12 (Supp. 1980)
25. N.J.A.C. 7:7E-8.11.
26. N.J.S.A. 2A:42A-8.
27. *Phillips*, 484 U.S. 469; *Matthews*, 95 N.J. 306.
28. 111 N.J.L.J. 489 (March 14, 1983).
29. *Le Compte v. State*, 128 N.J. Super. 552 (App. Div.), *certif. den.*, 66 N.J. 321 (1974).
30. *Sandler v. New Jersey Realty Title Insurance Co.*, 36 N.J. 461 (1962).

31. *Enright v. Lubow*, 202 N.J. Super. 58, 67 (App. Div. 1985).
32. Informal opinion letter from Theodore A. Winard, A.A.G. to David Moore, Chairman, Tidelands Resource Council, Nov. 26, 1984.
33. N.J.S.A. 13:1B-10.
34. N.J.S.A. 13:1B-13.
35. N.J.S.A. 13:1B-13; the attorney general signs all tidelands grants by virtue of N.J.S.A. 12:3-6, -7, and -10.
36. N.J.S.A. 12:3-7, and -16. If an application is denied, there is no processing fee at all.
37. N.J.S.A. 2A:62-1 *et seq.*
38. *Bailey v. Driscoll*, 19 N.J. 363 (1955).
39. *Dickinson v. The Fund For the Support of Free Public Schools*, 95 N.J. 65 (1983); *City of Newark v. Natural Resource Council*, 82 N.J. 530, *cert. denied*, 449 U.S. 983 (1980).
40. *City of Jersey City*, 95 N.J. 100 (1983).
41. *Le Compte v. State*, 65 N.J. 447 (1974).
42. *Atlantic City Electric Co. v. Bardin*, 145 N.J. Super. 438 (App. Div. 1976).
43. *Taylor v. Sullivan*, 119 N.J. Super. 426 (App. Div.), *certif. den.*, 62 N.J. 70 (1972).
44. *Bailey v. Driscoll*, 19 N.J. 363, 367 (1955).
45. *Atlantic City Electric*, 145 N.J. Super. 438 (App. Div. 1976).
46. For further information, counsel may consult Peter H.F. Graber, "The Law of the Coast in a Clamshell: New Jersey" *Shore and Beach* April 1982; Lewis P. Goldshore, *The Riparian Rights Handbook* (Trenton 1979); and David C. Slade, *Putting the Public Trust Doctrine to Work*, (Coastal States Organization, Washington, D.C. 1990).

CAFRA

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tions for a "permit by rule" for the expansion of a single-family home built on a bulkheaded lagoon lot. The expansion must be limited to 400 square feet and occur on the non-waterward sides of the dwelling.[31] Under the permit by rule, a CAFRA permit application and the applicable fee are not necessary. Rather, a letter to the DEP containing the information required by the regulations suffices to allow the activity. Once again, the DEP envisions proposing additional activities that can be conducted under a permit by rule in the near future.[32]

Environmental Impact Statements

The old CAFRA legislation required all CAFRA applicants to submit an Environmental Impact Statement (EIS) for the proposed facility. The new CAFRA legislation authorizes DEP to determine when an EIS is necessary and to decide the contents of the document.[33] Accordingly, DEP promulgated regulations requiring an EIS or a Compliance Statement to be submitted with all CAFRA applications.[34] Both documents are intended to provide a discussion of the specific rules, *i.e.*, DEP's Rules on Coastal Zone Management, that apply to the proposed project, as well as an assessment of the impact the proposed development will have on the environmental conditions at the site.

The primary distinction between an EIS and a Compliance Statement is the amount of detail required, which is related to the size of the proposed project, the conditions at the proposed site and the expected impact of the proposed development on the site.[35] Specifically, an EIS contains information that is not necessary for the Compliance Statement, such as traffic analyses, stormwater management calculations, archaeological surveys, environmental resource inventories, a habitat assessment and detailed design specifications for the proposed construction. In addition, the EIS will include more information regarding project alternatives and mitigation methods designed to reduce the overall impact of the proposed construction on the environment.[36] DEP encourages applicants to inquire as to the type of information required under DEP's Land Use Regulation Program before submitting a permit application.[37]

Penalties, Enforcement and Administration Changes

The penalties imposed for violating CAFRA are increased and the enforcement options available to DEP are expanded by the new legislation. The DEP is authorized to impose on any person who violates any provision of CAFRA a fine of $25,000 per day per violation. In addition, DEP can enforce the provisions of CAFRA through the courts or by issuing a compliance order.[38]

Tidelands Licenses

The State of New Jersey owns all lands which are naturally flowed by the mean high tide, which it has not previously sold. It also owns all lands formerly flowed which were flowed by the mean high tide, which it has not sold, and which have been artificially filled in. For example, the natural beds of the Hudson River, the Delaware River up to the head of tide in Trenton, Barnegat Bay, and the Atlantic Ocean to the three mile limit are State-owned tidelands. This ownership dates back to the charter from the English crown to Berkeley and Carteret and has it's basis in English Common Law. Since 1869, an appointed board has been making the initial decisions to sell or rent State owned tidelands.

This board is currently called the Tidelands Resource Council. The Tidelands Resource Council is a twelve member voluntary board appointed by the Governor with the consent of the Senate. Its members are special state officers with terms of 4 years. The Council meets twice monthly to make decisions on the selling or renting of State tidelands. The Bureau of Tidelands Management acts as the staff to the Council and reviews and processes all applications in this regard. The Council's actions must be reviewed by the Commissioner of the Department of Environmental Protection. In addition, all individual approvals for tidelands grants (to sell tidelands), or long term leases (20 to 30 years) must be reviewed and approved by the Commissioner of the Department of Environmental Protection, Attorney General and Governor.

This document will only explain in detail the tidelands licensing procedure. Anyone who wishes use presently tideflowed areas, for a dock, pilings, breakwaters, or other similar structures, must first obtain a tidelands license and waterfront development permit. (In some circumstances, other permits may be required.) A tidelands license is a short-term rental agreement with the State. Currently, the Council is approving licenses for a 7 year term, in accordance with the statutes. An applicant must first obtain the required permits before a tidelands license application will be presented to the Council.

Licenses are valued at a number which is based upon the current fair market value of the land being rented. These calculations are based upon percentages of the upland or dry land value. In general, the land under water being rented is valued at 15% of the upland for single family residential property and 25% for all others. The upland value is generally estimated using the assessed value equalized for the land. While this is just an estimate of the current fair market value, it helps the applicants by saving the cost of a narrative appraisal ($300 to $1500) each time a new license is issued or existing license renewed.

The Council also sets the rate per year that the licenses will be charged. Currently, this rate is 7% per year for all but marina licenses. In the past, when the economy was stronger and interest rates higher, the rate was 10% per year. There are a number of exceptions to the above generalities. When the staff has ore accurate information regarding value, such as a current sale or an appraisal nearby, that value will be used as the basis of the license fee. For marinas, or other income producing properties, the income stream is used as the basis of the fair market value.

Currently the Council charges 6% per year of potential income for marina licenses. The Council's marina practice was a direct result of input from the marina owners in the late 1980's. By valuing income producing marinas using the upland value of the property, the Council realized that the license fees were too high and not consistent Statewide. By evaluating information provided by the marina owners, the Council determined that the income method was not only a fairer way to treat the marinas, but was also more accurate in terms of meeting their responsibility to obtain fair market value for the land being rented. The Council has also continued to listen to applicants' concerns and has changed the rate at which is charges a number of time (from 10% in 1991 to 7% in 1992 and the current 6% since 1993). The Council reviews these rates and procedures yearly to determine if they are still a reflector of fair market value.

When a property owner is legalizing a dock or other structure, the Council will assess rental back to 1982 or when that property owner purchased the property, whichever is less. The year 1982 was chosen as the furthest extent of back rental because in that year, the tidelands claims maps were filed in most of the shore counties. At that time, there was a great deal of publicity and information available to the public, so that they became aware of tidelands issues. It should be noted that the Council and its predecessor boards have been renting tidelands since 1869 and have been charging back rental (also called use and occupancy) for almost as long. The administrative change to limit the years for back rental was made in 1993.

License fees are also dependent upon the size of the dock and the area being rented and when the license was issued. The license area is calculated by adding a buffer area around the structures, and also includes any slip areas within which boats are docked or moored.

For other details or additional information, please contact the Bureau of Tidelands Management at P. O. Box 439, Trenton, NJ 08625-0439.

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